UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:03-cr-77-T-30TBM

v.

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ

Defendants.
_____/

SAMI AL-ARIAN'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS 1, 2, 3, 4 & 44 & REQUEST FOR EVIDENTIARY HEARING ON PRE-INDICTMENT DELAY AND DESTRUCTION OF EVIDENCE

COMES NOW the Accused, Sami Al-Arian, and files the following memorandum of law in support of his previously filed Motion re: Pre-Indictment Delay and Destruction of Evidence pursuant to Court Order of November 1, 2004. See Doc.

MEMORANDUM

Pre Indictment Delay

> Nevertheless since a criminal trial is the likely consequence of our judgment and since the appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define appellees rights with respect to events occurring prior to Indictment. Thus the government concedes that the due process clause of the 5th Amendment would require dismissal of the indictment if it were shown at trial that the pre indictment delay in this case caused substantial prejudice to appelles right to a fair trial and that the delay was an intentional device to gain a tactical advantage over the Accused.
> *United States v. Marion, et al.* 404 U.S. 307 at 324 (1971)

> To establish a due process violation based on preindictment delay, a defendant must show that the reason for the delay "violates our fundamental conceptions of

justice." *United States v. Lovasco,* 431 U.S. 783, 790-91, 97 S. Ct. 2044, 2049, 52 L. Ed. 2d 752 (1977); *see also United States v. Marion,* 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468 (1971). In this circuit, the defendant must show that he suffered substantial prejudice and that the delay was the product of deliberate action by the Government to gain a tactical advantage. *United States v. Young,* 906 F.2d 615, 620 (11th Cir.1990); *see also United States v. Benson,* 846 F.2d 1338, 1341 (11th Cir.1988); *Stoner v. Graddick,* 751 F.2d 1535, 1543 (11th Cir.1985).

The government's indictment begins the Count (1) conspiracy from 1984, some 20 years prior to the actual indictment of these Accused. The Counts (2) and (3) conspiracies are alleged to have begun in 1988 some sixteen years ago. In 1994, 12 years later, with respect to Count (1) and 8 years after the beginning of the Counts (2) & (3) conspiracies, the government applied for and received a search warrant for Accused Al-Arian's home, office at USF and the office of WISE. The affidavit for the search warrant acknowledged that it was in part the product of a series of newspaper articles that had appeared in the mid 1990's in the Tampa Tribune.

The search was extreme in its scope, in that the search resulted in the seizure of virtually everything that was in the home office of Dr. Al-Arian. The search also by its very occasion established that at least by 1995, the government was able to persuade a magistrate to believe that Dr. Al-Arian was engaged in criminal conduct. However, sometime in 1996, shortly after the 1995 search, the government began to return to Dr. Al-Arian materials that it had seized.

Numerous items were returned apparently because the government had no use for them. Among the items returned were a computer, which had been broken as a result of the government's attempts to mirror the hard drive. Upon its return, and since it no longer was operable, the computer was thrown away.

From 1995 to 2000, a period of relative calm remained in effect between Dr. Al-Arian and the government. Unbeknownst to Dr. Al-Arian, in 1993 the government began to wiretap his home, office, fax machines and cell phones and the homes and offices of several of the codefendants. Although the period of 1995 to 2000 appeared to be a period of repose, it was not. Dr. Al-Arian continued to conduct his affairs believing governmental scrutiny had ended.

In the year 2000, some 16 years after the alleged beginning of the Count (1) conspiracy, the government began deportation hearings against Mazen Al-Najjar. The government was the initiator of the proceedings. Much of the information utilized against Al-Najjar was information that directly resulted from the 1995 search of Dr. Al-Arian's home, office and WISE. Also utilized against Al-Najjar was "secret evidence". In counsel's view this evidence was comprised, in part, of information gleaned from the ongoing F.I.S.A. wiretap. Ultimately, Al-Najjar was deported, thus the government, on its own accord, made Al-Najjar a person they now contend was a co-conspirator unavailable as either a witness or as an accused.

Al Najjar's unavailability was procured by the utilization of the very same evidence that the government is now seeking to use in his prosecution. By procuring Al-Najjar's unavailability, the government now has created a situation where the government can point to acts or statements made by Al-Najjar without anyone here to answer or challenge them. Ultimately, the government could attempt to prove its conspiracy indictments solely by reliance on statements made

and acts undertaken by Al-Najjar. Thus the defendant is prejudiced substantially by the government's arbitrary decision to deport Al-Najjar.

The manipulation of Al-Najjar into a defendant in this case afforded the government an additional tactical advantage. If permitted, the government is allowed to utilize a grand jury to investigate a currently pending indictment. By skillfully delaying the indictment of Al-Najjar until September 23, 2004, the government could "honestly" answer the question, with respect to the grand jury, when it was raised that it was 'investigation' of new parties and new crimes.

However, everything that the government knew about Najjar, it knew before the return of the first indictment. See *Alvarez, Beverly and Simel, supra,* as cited in previous Motion to Dismiss, Doc. 697. Thus the manipulation of Al-Najjar as a defendant provided a significant tactical advantage to the government. In *United States vs. Foxman,* the 11th Circuit defined tactical delay.

> In context, we think those cases used the words "bad faith" to mean that the government acted to delay an indictment, hoping that the delay--in and of itself--would prejudice the defense. In "bad faith" cases, the government intentionally acts to delay; and the tactical advantage sought *is* the prejudice to the defendant, which the government anticipates will flow from the delay. But, bad faith in this sense or in the sense of a subjective sinister motive is not critical to a due process violation for preindictment delay. The critical element is that the government makes a judgment about how it can best proceed with litigation to gain an advantage over the defendant and, as a result of that judgment, an indictment is delayed. Then, the question becomes whether that delay caused the defendant actual substantial prejudice. The government, as litigating party, might pursue tactical advantages other than prejudice directly caused by delay. We think intentional government acts designed to obtain a tactical advantage, which only incidentally cause delay, have never been ruled out as a potential basis for due process violations. The main point is showing acts done intentionally in pursuit of a particular tactical advantage: delay (and the prejudice directly caused by the delay) need not necessarily be the tactical advantage sought. *United States v. Foxman,* 87 F3d 1220 at 1223 (1996).

We also observe that many delays in obtaining an indictment would not be "tactical"--a word which we think inherently includes the concept of intentionally maneuvering for an advantage at trial. For example, not every delay which is the result of a need for further investigation gives rise to a due process violation. *Hayes,* 40 F.3d at 365. *Id.* at 1224

Destruction of Evidence

The minimization of the accused's conversations as a result of a F.I.S.A. wiretap has caused a substantial prejudice to the Accused's ability to prepare a defense. From 1993 to the present, the accused has been the subject of a wiretap pursuant to the Foreign Intelligence Surveillance Act.

As of this date, the defense is unfamiliar with the minimization requirements of the wiretap authority. Through the tech cuts, the defense has been able to determine that certain conversations were deemed not relevant. The defense is informed that over the course of the 10 year period of this wiretap, the Accused has had numerous conversations with a large number of public figures, members of Congress, both House and Senate members of the Executive Branch through the Clinton and Bush administrations, members of law enforcement and the intelligence services, defense lawyers, for instance Ramsey Clark, who was attempting to raise money for the blind sheik's defense. The tech cuts so far only reveal a small portion of this traffic and because this was a F.I.S.A. wiretap, the government was under no obligation to preserve exculpatory material. Thus, these materials are now lost to the defense.

Thus, in the instant case, we have the loss of exculpatory evidence, the minimized conversations, the emails from the new destroyed computers, the

passage of 20 years since the beginning of the alleged conspiracy, and memories of events and people, which have now frayed.

> We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence. *Barker* 407 U.S. at 532;see also *Smith v. Hooey*, 393 U.S. 374, 377-379, 21 L. Ed. 2d 607, 89 S. Ct. 575 (1969); *United States v. Ewell*, 383 U.S. 116, 120, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966).Of these forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532. Doggett claims this kind of prejudice, and there is probably no other kind that he can claim, since he was subjected neither to pretrial detention nor, he has successfully contended, to awareness of unresolved charges against him. *United States v. Doggett,* 505 U.S. 647 at 654.(1992)

In *Doggett,* while the Sixth Amendment inquiry involved an 8 ½ year lag between the accused's indictment and arrest, an interval of time which Justice Souter described as *extraordinary*, the Court found that the Defendant's constitutional right to a speedy trial had been violated. In the case before this Court, even though our claim rests on Due Process grounds, the language from *Doggett* is instructive in its holding that the inability of a defendant to adequately prepare his case because of the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence was the "most serious" form of prejudice.

Two decades have passed since the alleged inception of the conspiracy and the current indictment. Two decades have passed, resulting in impermissible prejudice to the effective defense preparation for trial. This case necessitates a similar analysis of presumptive prejudice by the Honorable Court as in *Doggett* and mandates that Counts 1,2,3,4 & 44 be dismissed. In the alternative, if the

Court deems it necessary to hear evidence on this issue of pre indictment delay, then we request an evidentiary hearing before the Court.

WHEREFORE, for the foregoing reasons and such others as may appear to the Court, the Accused submits that Counts 1,2,3,4 & 44 should be dismissed from the current indictment.

Dated: 1 November 2004

Respectfully submitted,

_/s/ Linda Moreno___
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Linda Moreno
Attorney for Sami Al-Arian